83-1125

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1983

GARY D. GORTMAKER,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari
to the Oregon Supreme Court

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QUESTIONS PRESENTED

1. Whether an accused is guaranteed, by minimum federal constitutional standards, a procedure to insure fair and random selection of jurors for a grand jury.

2. Whether a court of last resort in a state violates the supremacy clause of the United States Constitution when it renders a decision on the basis of state constitutional standards that effectively defeats due process provision of the United States Constitution.

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TABLE OF AUTHORITIES

Other Authorities

Petitioner Gary Gortmaker, respectfully prays that this Court enter a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Oregon in **State of Oregon v. Gary D. Gortmaker**, No. SC 29266 (August 16, 1983).

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported as **State v. Gortmaker**, 295 Or 505, _____ P2d _____ (1983). In its opinion and ensuing judgment, the Supreme Court affirmed the State Court of Appeals' decision of the same case at 60 Or App 723, 655 P2d 575 (1982) which affirmed the trial court's denial of petitioner's motion to quash the indictment. The opinion of the Oregon Supreme Court is attached to this Petition as Appendix A. The opinion of the Oregon Court of Appeals is reported at 60 Or App 723, 655 P2d 575.

JURISDICTION

The opinion of the Oregon Supreme Court was dated and filed on August 16, 1983. A Petition for Rehearing before the Oregon Supreme Court was filed by the petitioner in a timely manner and was denied by order on September 20, 1983. Pursuant to Oregon law, that judgment was stayed until twenty-one (21) days thereafter, i.e., until October 11, 1983. October 11, 1983 is the date that the Oregon Supreme Court's judgment in this matter is deemed to have been entered. The motion by the state to recall and reissue the decision and judgment is attached as Appendix B. The order by the Oregon Supreme Court designating October 11, 1983 as the date in which its judgment was entered, is attached as Appendix C.

Jurisdiction to review the Oregon Supreme Court judgment in this criminal case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(3). This petition for a writ of certiorari is filed within the 60-day period prescribed by 28 U.S.C. §

2101(d), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The resolution of the issues presented in this petition involves the Sixth and Fourteenth Amendments of the United States Constitution and Article VI of the United States Constitution.

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a trial, by an impartial jury of the state, wherein the crime shall have been committed."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, United States Constitution, provides in pertinent part:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judge's in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

STATEMENT OF THE CASE

I. Summary of Facts

Petitioner was the Marion County District Attorney from 1965 until the time of the trial. On May 27, 1980, a special grand jury was impaneled in the county to investigate allegations of criminal conduct by petitioner; it subsequently returned the indictments on which he was tried. The principal issue on appeal concerned the method of selecting the special grand

jury, which was as follows: In January 1980, the Marion County Court Administrator summoned 250 persons to serve on the jury panel for both the district and circuit courts for Marion County. Of the 250 persons summoned, between 70 and 95 actually reported. Some did not respond to their summons, and others were excused from duty, either by a circuit or district judge or by court administrative staff without consulting with a judge.

The regular term of jury duty in Marion County is two months, but the term of this jury panel, which was selected in January, was extended through June by order of the Court, because of the county's financial difficulties. During this extended term, some of the original 70-95 jurors were excused entirely after having served for more than four weeks. Others were temporarily excused, either by a judge or a member of the court's staff, for reasons of personal convenience, such as vacation plans. In addition, staff members were apparently unable to contact some of the original

jurors to inform them that their term had been extended, and, therefore, they were excused.

On May 21, 1980, the court administrator drew by lot the names of ten jurors for the special grand jury that was to investigate petitioner from all the jurors then remaining for jury duty and not known to be unavailable for duty commencing May 27. Of these ten jurors, five either could not be reached by the court staff or indicated to the staff that they would be unavailable for duty on May 27. The court administrator accepted the statements of the prospective jurors who indicated that they would be unavailable, without conferring with a judge as to whether they should be excused from service.

On May 22, the court administrator drew the names of four more jurors from all the remaining jurors not known to be unavailable. On May 27, some of the jurors selected on May 21 and 22 did not report for duty. In order to complete the special grand jury, a court secretary selected 17 jurors for a sub-pool,

from which two additional jurors were drawn by lot. The 17 were chosen, according to the secretary, because they had regularly attended during the three months that they had already served.

The petitioner essentially restates and hereby adopts the summary of facts as stated by the Oregon Court of Appeals. **State v. Gortmaker**, 60 Or App 723, 655 P2d 725-6, 655 P2d 575 (1983).

2. Procedural History: Basis of Federal Jurisdiction

In his appeal through the state appellate process, petitioner contended that the trial court erred in denying his motion to quash the indictments, because the grand jury was not selected by lot from among all the jurors in attendance as required by Article VII (Amended) § 5(2) of the Oregon Constitution, which provides: "A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of

whom must concur to find an indictment."

In his original motions to quash back at the trial court, petitioner also cited as the basis for his motion the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. A copy of petitioner's motions to quash are attached as Appendix D. See specifically, paragraphs (3) and (4) on pages 68 and 69 of Appendix D. A copy of the trial court's order denying the motion is attached as Appendix E. See specifically, paragraph IV.

Constitutional questions shown by the record to have been raised in the state court give the U.S. Supreme Court jurisdiction to review the case notwithstanding that the appellate court of the state did not refer to the federal question within its opinion. **International Harvester Company v. Missouri,** 243 US 199, 34 SCt 859, 58 LEd2d 1276 (1914).

The Oregon Supreme Court held that the state had merely committed certain "technical violations" of the procedural statute and constitutional process for

impaneling a grand jury. The Oregon Supreme Court was not impressed by the procedural deviation. The court ruled that the procedural default in the grand jury selection process was not sufficient to allow a challenge to the conviction.

This Court has consistently held that the question of when and how default in compliance with state procedural rules can preclude consideration of a federal question is itself a federal question. Whether the petitioner's federal constitutional right was denied or not given due recognition by the state appellate courts, is a question for which the petitioner is entitled to invoke this Court's judgment. **Henry v. Mississippi**, 379 U.S. 443, 85 SCt 564, 13 LEd2d 408 (1965).

The language in **Henry v. Mississippi** presumes that the state adheres to the procedural rules, and that the petitioner was in violation. The Court ruled that procedural default should not bar vindication of important federal rights for the petitioner. Id. at 448.

Here, the petitioner urges compliance with the procedures for grand jury selection, and it was the state who violated its own procedure to the prejudice of the petitioner.

REASONS FOR ALLOWANCE OF WRIT

This case presents important issues of federal law which should be settled by this Court. The Oregon Supreme Court decided, by its interpretation of Article VII, § 5(2) of the Oregon Constitution, to limit due process guarantees of the federal constitution for petitioner and Oregon citizens. Specifically, the Oregon Supreme Court minimizes due process guarantee by ignoring prior interpretation by this Court of the purpose and effect of the due process clause with respect to grand jury selection.

Discussion

1. **Minimal federal constitutional standards preserve procedures to insure fair and random selection of jurors for a grand jury.** In this case, certain state laws had been enacted and the Oregon

Constitution was written to insure preservation of a fair and unbiased process for random selection in impaneling a grand jury. Oregon Constitution, Article I, § 5(2). The court administrator, of the court in which the petitioner served as district attorney for 16 years, supervised the impaneling of a special grand jury which violated the procedures as required by state statute and the Oregon constitution. It is clear from the facts that the pool from which the petitioner's grand jury was selected was diminished and massaged and was not the pool intended by the Oregon Constitution. The State Legislative Assembly could not have constitutionally authorized the process of selection used here.

Yet the Oregon Supreme Court narrowed its focus to the language at Article VII, § 5(2) of the State Constitution and found the practice to be acceptable. The Oregon court failed to consider whether federal constitutional standards were compromised.

The right to a fair trial in a fair tribunal is

basic to the due process clause of the United States Constitution. This aspect of due process is quite separate from the right to a particular form of proceeding. If a state chooses, as Oregon has, to use a grand jury, due process, as a federal constitutional guarantee, imposes limitations on the composition of the jury. **Peters v. Kiff**, 407 U.S. 493, 501, 92 SCt 2163, 33 LEd2d 83 (1972).

Oregon undertook to provide limitations on it's jury selection process, and then, in this instance, allowed inexplicable deviation. Once a particular form of proceeding is allowed, the process must be preserved to ensure it is used to further it's constitutional purpose; it must not be allowed to be manipulated by the state to thwart constitutional ends.

The Oregon court ruled that although the procedures for empaneling a grand jury were violated, the "technical violations" were not sufficient to "result in standing to launch a constitutional attack." **Gortmaker, supra**, 295 Or at 522. The Oregon court

held that petitioner failed to prove that the violations were consequential to result in prejudice.

This Court has held that even if there is no showing of actual bias in the tribunal, due process is denied by circumstances that create the likelihood or the appearance of bias. "Our system of law has always endeavored to prevent even the probability of unfairness." **Peters, supra**, 407 US at 502. These principles of due process compel that a state cannot subject a criminal defendant to indictment by a grand jury that has been selected in an arbitrary and discriminatory manner. Id.

While the **Peters** decision factually involved the systematic exclusion of blacks from the jury, the court's decision goes beyond that to preserving fairness of process by compliance with constitutional and statutory requirements to ensure against compromising fair tribunal. "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." Id. Here, the evidence was

not refuted that the selection process was unlawful and arbitrary. Furthermore, it was supervised by employees of the court in which petitioner had served as District Attorney for sixteen years. The courthouse and District Attorney's Office was intimately involved in this case; the staffs were divided. Many lawyers, judges and staff personnel testified at trial.

Formal criminal complaint by way of indictment from a grand jury is one more constitutional safeguard for the individual who stands accused at the mercy of the state. This is recognized in the decision by the Oregon Supreme Court below.

> "'. . . It is a familiar historical fact that the system which was devised to prevent harassments growing out of malicious, unfounded, or vexatious accusations. That it served the purpose of allowing prosecutions to be initiated by the people themselves in no way detracts from the fact that it still stands as a safeguard against arbitrary or oppressive action. . ..' **United States v. Wells**, 163 F. 313, 324 (D.C. Idaho 1908)." **State v. Gortmaker**, 295 Or 505, 512, ___ P2d ___ (1983).

Perhaps the greatest piece of evidence that a

state has in presenting the merits of its case in prosecution of a defendant is the charging instrument itself. The prejudicial effect of the very fact of accusation by the law enforcement mechanism of the state cannot be denied. The authors of the United States Constitution recognized this and attempted to offset the potential prejudice by imposing a heavy burden of proof on the state, by allowing a trial by a jury of peers, by mandating a presumption of innocence, by providing the accused with the right to confront his accuser, and by insuring constitutional safeguards on how the charging instrument is generated. Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Our criminal justice process works well with all of these constitutional counter-balancing provisions to neutralize the fact of accusation. All of these safeguards cumulate together to arrive at this balance. When one safeguard is compromised, i.e., indictment process, the balance is upset and neutrality

is lost.

2. **For the Oregon Supreme Court to ignore the due process provision of the United States Constitution as it has been interpreted by this Court, and to allow less process for constitutional protection of rights for a criminal defendant through interpretation of the state constitution, is a violation of the supremacy clause of the United States Constitution.** The Oregon Supreme Court is the only body with authority to ultimately determine the meaning of the Oregon Constitution. It has rendered its interpretation of Article VII, § 5(2) in a way that it is not violated by the grand jury selection process in this case. As demonstrated above, such selection process does violate the due process clause of the United States Constitution as interpreted by this Court. Therefore, there is a conflict between the United States Constitution and the Oregon Constitution with respect to the amount of protection

provided to an accused in insuring a properly and fairly impaneled grand jury.

Where there is a conflict between the federal and state constitution, the Supremacy Clause at Article VI of the United States Constitution controls. **Reynolds v. Simms**, 377 US 533, 84 SCt 1042, 12 LEd2d 506 (1964).

CONCLUSION

The Oregon Supreme Court failed to account for constitutional safeguards in the United States Constitution in rendering its construction of the Oregon Constitution in a way that gives a criminal defendant even less protection from state process in the impaneling of the grand jury. The significance of the issues transcends this particular case, because it allows inexplicable deviation and arbitrary selection procedures in the empaneling of a grand jury.

For all of the reasons discussed above, this Petition for Writ of Certiorari to the Oregon Supreme Court should be granted.

Respectfully submitted,

PAUL J. De MUNIZ

Counsel for Petitioner

APPENDIX A

Body of Decision of Oregon Supreme Court, for which Petition for Writ of Certiorari is brought.

This decision is reported as State v. Gortmaker, 295 Or 505, __ P2d __ (1983).

JONES, J.

Defendant appeals his conviction for two counts of theft in the first degree and one count of official misconduct.[1]

The sole question upon which we allow review is whether the special grand jury which indicted the defendant was constitutionally selected under Article VII (Amended), Section 5, of the Oregon Constitution. The Court of Appeals held that the grand jury selection procedure violated the Oregon Constitution but the defendant's subsequent "reliable conviction" by a properly selected trial jury negated the constitutional violations and allowed the conviction to stand. We affirm the Court of Appeals decision, but

for different reasons.

The defendant argues on constitutional grounds that the trial court erred in failing to quash the indictment on at least one of three grounds: (1) that grand jurors were selected from a petit jury panel in violation of Article VII (Amended), Section 5(1)(b), of the Oregon Constitution, (2) that the Marion County Court Administrator excused prospective grand jurors from the grand jury panel without authority of the court and for reasons not allowed by statute and this resulted in less than random selection, and (3) that because some grand jury members were not selected by lot from among all the jurors in attendance at the court as required by Article VII (Amended), Section 5(2), of the Oregon Constitution.

The state responds that the defendant is prevented from attacking the grand jury selection procedure because of the limitations of ORS 135.510(1), which reads:

> "The indictment shall be set aside by the court upon the motion of the defendant

in either of the following cases:

(a) When it is not found, indorsed and presented as prescribed in ORS 132.360, 132.400 to 132.430 and 132.580.

(b) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

The state also takes the position that ORS 10.050(1),[2] as applied by ORS 132.030,[3] further prohibits the defendant's challenge to the procedure utilized for empaneling the grand jury. If the defendant were simply claiming that the state had violated a statute in the procedure that was utilized for empaneling the grand jury, we would be inclined to agree with the state that these statutes prohibit such a challenge. For over 100 years such an objection has been in effect a challenge to the panel and not to individual jurors and such a challenge has long been abolished by statute in Oregon. See, State v. Fitzhugh, 2 Or 227 (1867);[4] see also State v. Dale, 8 Or 229 (1880); State v. Savage, 36 Or 191, 60 P 610, 61 P 1128

(1900). A predecessor statute[5] was applied in State v. Ju Nun, 53 Or 1, 97 P 96, 98 P 513 (1908), where this court held that specific statutory challenges are the only challenges allowed to a grand jury. However, we did state "[i]t may be that, if persons were called or summoned as jurors wholly without color of law, an objection on that ground would be available to a litigant, for in such a case the persons so called or summoned would not be a jury either de facto or de jure." Id. at 5. In Ju Nun we followed State v. Dale, supra, where we said if a juror were improperly or illegally drawn or summoned a challenge was available outside the statute. The Ju Nun court held "[w]here, however, the drawing and summoning is under color of law and semblance of legal authority, and the jurors are accepted and treated by the court as legal jurors, they are at least such de facto; and it is not open to a litigant to object to their serving in a particular case on the ground that the law under which they were drawn is unconstitutional." Ju Nun, 53 Or at 6.

In State v. Carlson, 39 Or 19, 25, 62 P 1016, 62 P 1119 (1900), we held pursuant to the statute:

> "* * * No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court having thus imposed upon the court the duty of ascertaining the qualifications of grand jurors before accepting them, and prohibited all persons from challenging the panel or any individual grand juror, it remains to be seen whether the statute, in these respects, is violative of any constitutional provision. * * *" (Emphasis supplied; citation omitted.)

In State v. Lawrence, 12 Or 297, 7 P 116 (1885), a grand jury was empaneled under the authority of a statute which allowed the jurors to be selected several days prior to the start of the term of the court. Although the statute prohibited a challenge to the indictment on that ground, see State v. Whitney, 7 Or 386, 388 (1879), we found the statute under which the grand jury was selected violated Article VII (Original), Section 18, quashed the indictment and reversed the defendant's conviction. We held:

> "* * * [I]t is the constitutional right of a defendant accused of a crime to demand that the indictment shall be found by a grand jury selected only as provided in the Constitution. * * *" Lawrence, 12 Or at 300.

Review of this court's rulings for over 116 years clearly reveals that if the defendant had restricted his attack to statutory grounds, he would be prohibited from attacking the procedure used in empaneling the grand jury. However, the defendant has consistently argued that the selection procedure used in empaneling the grand jury which indicted him was in violation of the Oregon Constitution. Notwithstanding this position, the trial court, relying upon ORS 135.510, and the holding of State v. Bock, 49 Or 25, 88 P 318 (1907), found that the defendant was prohibited from attacking the grand jury selection procedure on constitutional grounds. The Court of Appeals disagreed and ruled the defendant could make a direct constitutional challenge to the procedure outside the complex maze of statutes, legislative history and court

decisions surrounding statutory violations.

Since Oregon's grand jury is created in the constitution, we hold the grand jury procedure to constitutional requirements. Article VII (Amended), Section 5, of the Oregon Constitution, mandates the legislative assembly to provide by law for the selection and qualification of grand jurors. Article VII (Amended), Section 5, cannot be read as reserving to the legislature the power to enact statutes which serve to prevent constitutional challenges to grand jury procedures.

The defendant's attack is restricted to a constitutional challenge of the grand jury selection procedure. The defendant makes no claim of actual bias or prejudice of any of the grand jurors selected. Because Oregon's constitution has an express provision, Article VII (Amended), Section 5 (1)(b), regarding the selection of grand jurors from a petit jury panel, we begin our discussion by tracing the history of the grand jury and in particular the underlying principles

surrounding Article VII (Amended), Section 5(1)(b).

HISTORICAL ROOTS OF THE GRAND JURY

The origin of the grand jury is veiled in obscurity.[6] It has never been resolved whether the idea developed from ancient Roman law,[7] whether it was a Norman institution introduced into England by William the Conqueror,[8] or whether it developed in England out of Anglo-Saxon institutions.[9] The earliest recorded juries were employed to investigate and answer inquiries addressed to them by the king:

> "* * * The function of the jury of presentment [grand jury] shows that it is the lineal descendant of these juries. It is summoned to discover and present to the king's officials persons suspected of serious crime. It is probable that the regular use of the jury for this purpose in the royal courts dates from the Assize of Clarendon. * * * It made the use of the presenting jury general, both in the courts held by the king's judges and the sheriff's tourns. We have seen that both at the Eyre and the tourn presentments were made by representative juries from the hundred. These juries could present either from their own knowledge or from the information of others, just as at the present day the grand jury may present

matters which they themselves have observed, or, as is more usual, may endorse the indictments or accusations made by others.

"We have seen that in the thirteenth century the jury was selected, as directed by the Assize of Clarendon, from the several hundreds. Juries of this kind were needed to answer the detailed enquiries contained in the articles of the Eyre. But, when the general Eyre ceased, when criminal justice had come for the most part to be administered by either the itinerant justices acting under more limited commissions, or by the justices of the peace in quarter sessions, the method of the selection of the grand jury changed. The sheriff was directed to summon for the business either of the assizes or of the quarter sessions twenty-four persons from the body of the county. From these, twenty-three are chosen, a majority of whom decides whether to 'find a true bill' or 'ignore' the accusations preferred.

"The presentments made by the grand jury do not and never did amount to an assertion that the person presented is guilty. They are merely an assertion that he is suspected. * * * [I]n the thirteenth and earlier part of the fourteenth century all or some members of the grand jury always formed part of the petty jury; and the judges sometimes considered that when the members of a petty jury who had presented a person as suspected, acquitted him, they had contradicted themselves, and could be

> punished. But, as the grand jury came to be separated from the petty jury, the distinctive character of their functions was more clearly realized. It came to be recognized that the function of the grand jury is merely to say whether from the evidence for the prosecution (at which alone they look) there is probable ground for suspicion." (Footnotes omitted.) Holdsworth, History of English Law, Vol I, p 321-22 (1922).

The criminal petit jury was preceded in historical development by the accusing (grand) jury and evolved from it. Holdsworth, supra. The Crown, interested in securing convictions, was opposed to the total elimination from the petit or trial jury of all the members of the presenting jury. "As Parning, J., said in 1340: 'If indicters be not there it is not well for the king.' Y.B. 14, 15 Ed. III (R.S.) 260." Holdsworth, supra at 325. "Gradually, however, the grand jury and the petty jury became separated, and the feeling against the practice of including indictors in the trial jury became so pronounced that in 1351-1352 a statute was enacted which prevented an indictor from sitting on the trial jury of one indicted for felony or trespass if

the accused challenged him." Wayne L. Morse, A Survey of the Grand Jury System, 10 Or L Rev 101, 114 (1931).

A grand jury serves a high function. As stated in United States v. Wells, 163 F 313, 324 (DC Idaho 1908):

> "* * * It is a familiar historical fact that the system was devised to prevent harassments growing out of malicious, unfounded, or vexatious accusations. That it serves the purpose of allowing prosecutions to be initiated by the people themselves in no way detracts from the fact that it still stands as a safeguard against arbitrary or oppressive action * * *."

The same view was stated by Mr. Justice Field, sitting as Circuit Justice:

> "* * * In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused

> of public offenses upon just grounds, but also as the means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity." Quoted from 2 Sawy 668 in United States v. Wells, Ibid.

OREGON'S GRAND JURY SYSTEM

Following considerable debate,[10] the framers of Oregon's Constitution created a grand jury system embodied in Article VII, Section 18, of the original constitution:[11]

> "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment: but the Legislative Assembly may modify or abolish grand juries."

In 1899, the legislature authorized as an alternative to indictment by grand jury, prosecution on information of the district attorney. Or Laws 1899, p. 99. A 1908 constitutional amendment repealed the 1899 statute prospectively and required indictment in

all cases. In 1910, Section 18 was amended by Section 5 which substantially added language to the selection process providing:

> "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom just concur to find an indictment. But provisions may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, and for the sitting of the grand jury during vacation as well as session of the court, as the judge may direct. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury: provided, however, that any district attorney may file an amended indictment whenever an indictment has by ruling of the court been held to be defective in form."

A 1927 amendment to this section permitted waiver of indictment by the accused, with power in the district attorney to then proceed by information:

> "* * * No person shall be charged in any circuit court with the commission of any

> crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by ruling of the court, been held to be defective in form; provided further, however, that if any person appears before any judge of the circuit court and waives indictment, such person may be charged in such court with any such crime of misdemeanor on information filed by the district attorney * * *."

A 1958 amendment repealed Section 18 of Article VII (Original) and empowered the court to empanel more than one grand jury in a county. In 1974, Article VII (Amended), Section 5, of the Oregon Constitution was repealed following a referendum vote by the people. The following section was adopted:

> "(1) The Legislative Assembly shall provide by law for:
>
> "(a) Selecting juries and the qualifications of jurors;
>
> "(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;
>
> "(c) Empaneling more than one grand jury in a county; and

"(d) The sitting of a grand jury during vacation as well as session of the court.

"(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

"(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

"(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

"(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the prison has been held to answer upon a showing of probable cause that a crime punishable as a felony has been commmitted and that the person has committed it, or if the person knowingly waives preliminary hearing.

> "(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form.
>
> "(7) In civil cases three-fourths of the jury may render a verdict." Or Const, Art VII (Amended), § 5.

Of significance is that the 1974 amendment eliminated the constitutional requirement that the grand jurors should be selected from the most competent of the permanent citizens of the county, substituting a mandate to the legislative assembly to provide by law for selecting juries and the qualifications of jurors. ORS 10.110 (amended by Or Laws 1955, ch 717, § 1; Or Laws 1957, ch 393, § 1; and Or Laws 1973, ch 836, § 312) had previously substantially adopted the language from the constitution and no additional legislation[12] was required. ORS 10.110 provides:

> "The county clerk of each county shall, at the first term of each year of the circuit court for the county, or in case of an omission or neglect so to do then at the following term, make a list of the most competent of the permanent citizens of the county by selecting names by lot from the latest voter registration lists or any other source which will furnish a fair cross section of the county wherein the court convenes, denominated a preliminary jury list. From the preliminary jury list the names of those persons known not to be qualified by law to serve as jurors shall be deleted. The remaining names shall constitute the jury list. The names of those persons deleted from the preliminary jury list shall be placed on a separate list, denominated rejected prospective jurors, and opposite each name the reason for removing the name shall be set forth."[13]

SELECTION OF THE SPECIAL GRAND JURY

We allowed review limited to the grand jury selection procedure and, consequently, a discussion of the facts involved in the offense is unnecessary.

Defendant was the Marion County District Attorney from 1965 until his conviction. Following an investigation by Oregon's Attorney General, a special grand jury was empaneled in Marion County to

investigate allegations of criminal conduct by the defendant largely occurring under the guise of his official position as district attorney. The special grand jury returned indictments which resulted in defendant's conviction. The Court of Appeals found "[t]he method of selecting this grand jury violated Article VII [Amended], Section 5(2), and the trial court erred in failing to quash the indictment." State v. Gortmaker, 60 Or App 723, 736, 655 P2d 575 (1982). However, the Court of Appeals upheld the defendant's conviction because the error "has not affected the fact finding process" and he was "not prejudiced." Id. at 740.

Marion County is not unlike several Oregon counties which found it efficient to employ professional managers to administer the court's business. These "court administrators"[14] have had wide-ranging duties and responsibilities and accordingly were afforded some discretion to successfully accomplish their managerial tasks. The

Marion County Court Administrator, among various other duties, was delegated by the circuit court the responsibility for summoning persons to serve on the county's grand and petit juries. Concurrent with this delegation of responsibility was a delegation of authority to make decisions regarding the process that would be used for the summoning of the jurors. In January, 1980, the Marion County Court Administrator summoned 250 persons pursuant to ORS 10.110, infra, for service on the jury panel of both the district and circuit courts for Marion County. Approximately 70 to 95 actually reported for jury duty. The court administrator testified those excused from duty were excused for various reasons either by circuit or district court judges or by court administrative staff.[15]

Although the normal term of jury duty in Marion County is two months, this particular jury panel was extended by court order for four months in an effort to relieve the county of financial constraints. Some of the original 70 to 95 jurors were

excused from further duty after having served four weeks, see ORS 10.050(3).[16] Some members were temporarily excused for personal reasons by a judge or court staff members.

The court administrator testified she received instructions from a circuit court judge to summon jurors for a special grand jury to hear evidence in the defendant's case. On May 21, 1980, the court administrator drew by lot the names of 10 prospective jurors for the special grand jury from all the original jurors remaining for jury duty known to be available for duty commencing May 27.[17] None of the jurors was physically present at the court during this selection. The selection was supervised by a circuit court judge. Of the 10 jurors selected by lot, five either could not be reached by the court staff or indicated that they would be unavailable for duty on May 27. The court administrator excused these five jurors.

On May 22, 1980, a court clerk selected four more jurors by lot from the initial group. Again, none of the jurors was physically present at the court at the time of the selection, and this selection was also supervised by a circuit court judge. The actual selection of the grand jury was to be made the following Tuesday, May 27, 1980.

On Friday, May 23, 1980, the court clerk responsible for calling prospective petit jurors was told that juries for two district court cases would be needed the following Tuesday, May 27, 1980. (Monday, May 26, 1980, was a holiday).

On Friday, May 23, 1980, the court clerk responsible for calling prospective petit jurors was told that juries for two district court cases would be needed the following Tuesday, May 27, 1980. (Monday, May 26, 1980, was a holiday.) By this time the number of regular jurors available for service, for unexplained reasons, had been reduced to some 30 to 40 jurors. The names were on a list. After calling the first 25 of

the 30 to 40 persons whose names were on the list, the clerk was able to reach 18, who were requested to appear for jury duty the following Tuesday. Seventeen showed up on Tuesday.

On Tuesday, May 27, eight of the nine jurors selected on May 21-22, 1983, reported for duty. Two were excused by a circuit court judge after the court's voir dire. Finding it necessary to select one additional juror to complete the special grand jury, and an alternate, a judge's secretary obtained the names of the 17 jurors who had been called (as petit jurors) to hear district court cases, and from these 17 jurors the final grand juror was drawn by lot. These 17 jurors were physically present at the court during the selection which was supervised by a circuit court judge.

IMPROPER EXCUSING ISSUE

The defendant argues that the court administrator excused prospective grand jurors from

the grand jury panel without the authority of the court and for reasons not allowed by statute and consequently violated the defendant's constitutional rights. The record is not a model of clarity on this point, however there is adequate support to rebut the defendant's argument ORS 10.050(1) states that "[t]he court shall excuse a person from acting as a juror upon a showing of undue hardship or extreme inconvenience to the person * * *." Although a judge did not personally excuse each juror, the facts indicate that the court administrator excused prospective jurors and did so pursuant to delegated authority. The extent to which the circuit court judges were consulted by the administrator's office during the initial panel selection process is disputed by the parties, although it appears the administrator handled most of the determinations of whether particular jurors were required to report for service, and there is some evidence that court administrative personnel excused some prospective jurors for non-statutorily defined reasons. There is no

showing such exclusions were based on criteria reflecting either a discrimination intent or effect. In these circumstances, we cannot say any errors contravened the principle of objectivity or random selection or otherwise violated the constitution. The record indicates the court staff's actions were consistently monitored, controlled or ratified by one or more circuit court judges.[18]

CONSTITUTIONALITY OF DRAWING GRAND JURORS FROM A PETIT JURY PANEL

We think it was with English history in mind[19] that the 1910 Legislative Assembly sought to insure that a member of an indicting grand jury would not be allowed to sit as a petit juror to judge the guilt or innocence of the one indicted. To insure that such an occurrence would not happen, those empowered with the selection of the members of the grand jury were constitutionally mandated to insure that no petit jury member had been on the indicting grand jury. In 1974,

Article VII (Amended), Section 5(1)(b), continued this mandate by directing that grand jurors shall be selected by "drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors." We read this provision to operate in only one direction. A grand juror who sits on an indicting grand jury may not sit on the petit jury which hears the case against the same defendant. This does not mean, ipso facto, that one who has served on a petit jury during the term of a panel may not be selected to sit on a grand jury during the same term. We do not see how the defendant could be prejudiced by the presence of such a juror on the grand jury and believe our analysis to be consistent with the intent and spirit of the constitution. See generally, Comments, Grand Jury Selection: Voter Registration Lists as a Cross Section of the Community, 52 Or L Rev 482 (1973).

We find no constitutional infirmity resulting from the selection of the last grand juror from a petit

jury panel.

IN ATTENDANCE AT THE COURT ISSUE

The defendant contends that the grand jurors were not selected "from the whole number of jurors in attendance at the court." Article VII (Amended), Section 5(2).[20] The defendant suggests this constitutional provision means every prospective grand juror, be it the initial panel of 250, the reduced panel of 70 to 95, or even the 40 jurors, required by statute, ORS 10.220(1),[21] must be physically in the confines of the room in which the prospective grand jurors are selected. Defendant offers no explanation for the possible purpose that could be served by such a procedure and offers no authority in support of his position.

In State v. McReynolds, 212 Or 325, 328, 319 P2d 904 (1957), we held:

> "* * * Casual reference to Oregon Constitution, amended Article VII, § 5, will disclose that there is no longer any constitutional requirement that grand

> jurors be chose from the 'whole number in attendance at the court' if provision is otherwise made by law, as authorized in that section. We find no statute which has taken advantage of the alternative procedure authorized in that section and therefore we conclude that the grand jury which the court found to have been duly impaneled during the May 1956 term was chosen under the provisions of ORS 132.020. That section prescribes the method by which grand jurors shall be selected and may be accepted by the court from the jurors in attendance upon the court at the time of the selection. * * *"

Until the time that the circuit court judge actually selected the members of the grand jury they were merely "prospective grand jurors" and their physical attendance at the court when their names were selected was unnecessary, not required by the constitution, and not required to avoid prejudice to the defendant. We think a reasonable interpretation of "in attendance at the court" in this context means summoned and under court supervision, but not necessarily physically present.[22] Consequently, we find no violation of the defendant's constitutional

rights in this regard.

RANDOM SELECTION

The Oregon Constitution, Article VII (Amended), Section 5(2), requires that the grand jury be "chosen by lot from the whole number of jurors in attendance at the court." ORS 10.220(1) directs that "40 names shall be drawn, from which number the grand jurors * * * for the term are selected * * *." The record in this case indicates that 70 to 95 jurors formed the original panel from which the grand jury members were selected at two separate drawings. In the second drawing, the seventh member was selected in the manner set forth at pages 20-21. It is this second drawing that requires close scrutiny.

One of the reasons underlying the constitutional and statutory requirements that the jurors be chosen by lot is to guarantee that the selection will be made in a random manner. Random selection is to prevent the hand-picking of some jurors or the systematic

exclusion of others to obtain a fair cross-section of the community. See, United States v. Davis, 546 F2d 583, 589 (5th Cir), cert den 431 US 906 (1977). However, the fundamental purpose of the law is to prevent discrimination, whether it be on account of race, color, religion, sex, national origin, or economic status. Where the procedural errors made by those in charge of selecting jurors do not raise the possibility of defeating this goal, a court should be hesitant to order the drastic remedy of the dismissal of indictments.

We are satisifed that the selection of the seventh grand juror complied with the statute and constitution. The name was selected "by lot." The 17 names were selected on a Friday for petit jury service the next Tuesday. At that time, for reasons that are not clear from the record, there were but 30 to 40 regular jurors available for service the following Tuesday. The selection of the 17 names was not made with grand jury service in mind. The selection appears

to have been made in a random manner in the sense that the clerk called names from the list of available jurors until 18 persons were reached. On the following Tuesday, when the grand jury selection procedure turned up one short, the name of the seventh grand juror was selected at random from the names drawn the previous Friday, who arrived on Tuesday.

There is nothing to suggest that the "whole number of jurors in attendance at the court" the previous Friday exceeded the 30 to 40 previously referred to. The selection appears to have been made in random fashion.

One result of requiring seven grand jurors to be chose from a starting pool of 40, ORS 10.220(1), is the creation of a ratio of at least 7-in-40 (4.7-to.1), to insure a random cross-section of the community. In the instant case, when the final juror was drawn from the names of 17 who had been selected in an essentially random manner, the mathematical ratio increased to 17-to-1.

CONCLUSION

The unique facts of this case allow the defendant a direct constitutional attack on his indictment. Unconstitutional grand jury selection proceedings cast doubt on the integrity of the whole judicial process, compare, Peters v. Kiff, 407 US 493, 92 S Ct 2163, 33 L Ed 2d 83 (1972), and cannot be tolerated in Oregon. But such was not the case here. We hasten to point out that every alleged misapplication of state law does not constitute an Oregon constitutional question. Technical violations of statute which result in grand juries which are drawn in a manner not strictly according to statute but result in proper persons being fairly drawn by lot will not necessarily result in standing to launch a constitutional attack to quash an indictment. Inconsequential statutory irregularities will not vitiate the indictment. See, State v. Champeau, 52 Vt 313, 36 Am Rep 754 (1880); see also State v. Clark, 141 Iowa 297, 119 NW 719 (1909) (that a grand jury list from which a

panel was drawn contained 73 names, instead of 75, as required by law, did not affects its validity).

As we stated in State v. Brumfiled, 104 Or 506, 511, 209 P 120 (1922):

> "In this state the courts have always refused to allow mere technical objections to the method of impaneling a grand jury to enable a defendant to escape the conseqences of a trial upon the merits. [Citations omitted]."

The defendant has failed to show that the ultimate and — a constitutional grand jury selection — was not obtained. As the United States Supreme Court said in Beck v. Washington, 369 US 541, 555, 82 S Ct 955, 8 L Ed 29 98, 110, reh den 370 US 965 (1962), "we would be exalting form over substance" if we were to set aside this conviction.

The Court of Appeals is affirmed but for the reasons stated in this opinion.

FOOTNOTES

[1] The Court of Appeals opinion states the defendant is appealing his convictions for theft in the first degree, tampering with public records, unsworn falsification, and official misconduct. The record indicates that the defendant was indicted for three counts of theft in the first degree, two counts of tampering with public records, two counts of unsworn falsification, and one count of official misconduct. The jury found the defendant guilty of all eight counts. The trial court issued three separate judgments. On one count of theft the defendant was sentenced to a discharge. On the official misconduct count, the defendant was sentenced to pay a $500 fine. The remaining six counts were merged on the state's motion into a single count of first degree theft for which the defendant was sentenced to a term of imprisonment not to exceed four years.

2 ORS 10.050(1):

> "The court shall excuse a person from acting as a juror upon a showing of undue hardship or extreme inconvenience to the person, the person's family, the person's employer or the public served by the person. In applying this subsection the court shall carefully consider and weigh both the public need for juries which are representative of the full community and the individual circumstances offered as a justification for excuse from jury service. A person may request and be granted excuse from jury service under this subsection by means of telephone communication or mail."

3 ORS 132.030 provides:

> "Neither the grand jury panel nor any individual juror may be challenged, but the court may at any time after a juror is drawn refuse to swear him or discharge him upon a finding that the juror is disqualified from service for any of the reasons prescribed in ORS 10.050."

4 Although the state has cited this case in support of its position, we read that part of the court's holding as obiter dicta because of the court's finding that the defendant failed to object at the time the grand jury was empaneled and sworn and was deemed to have

waived any objections.

5 General Laws of Oregon, ch 10, § 115, p 460 (Deady Code 1845-1864), provided:

> "The indictment must be set aside by the court, upon the motion of the defendant, in either of the following cases:
>
> "(1) When it is not found, endorsed and presented as prescribed in chapter VII of this code;
>
> "(2) When the names of the witnesses, examined before the grand jury, are not inserted at the foot of the indictment or endorsed thereon."

6 See, Forsyth, Trial by Jury (1875): "Few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury."

7 Pollock & Maitland, History of English Law, Vol I, at 141 (2d ed 1898, reissued 1968).

8 Edwards, The Grand Jury, 2 (1906).

9 Ibid. n 11.

10 See Carey, The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 (1926) (printed under the direction of the Oregon Historical Society, in accordance with the provisions of Or Laws 1925, ch 379).

11 We have reviewed the careful study conducted by Palmer, The Sources of the Oregon Constitution, 5 Or L Rev (1926). In the opinion of this author, the

article on the judicial department is a combination of:

> "(1) the minds of the members of the committee of the judicial department, (2) the judicial system in vogue under the territorial government, and (3) the Wisconsin judicial system as outlined in Article VII, Wisconsin Constitution of 1848. There are certain earmarks which seem to indicate that Article VII may be traced to the Wisconsin Constitution of 1848. At the outset it may be stated with confidence that the framers of the article were thoroughly familiar with the act of Congress passed August 14, 1848, entitled an Act to Establish the Territorial Government of Oregon."

12 A review of the legislative history preceding this statute indicates that the major purpose of the legislation was to create a uniform method of preparing jury lists. Minutes, Senate Bill 49, Senate Judiciary Committee, Feb. 8, 1957.

13 ORS 10.110 was also amended by Or Laws 1981, ch 3, § 44, which has no relevance here.

14 Various names may apply to the same position such as "jury supervisor," etc.; however, "court administrator" can be found in various statutes, e.g., ORS 10.460.

15 The court administrator testified that various reasons such as advanced age, health, inability to locate, and job conflicts formed the basis for the decision to excuse jurors.

16 ORS 10.050(3):

> "A person shall not be required to serve as a petit juror at any one term of the court for more than four weeks, and shall, upon application, be entitled to be discharged from further attendance upon the court as a juror at such term, after having served for a reasonable period of time, as determined by the court, not to exceed four weeks."

17 The court administrator testified she was unable to recall how many prospective jurors remained at the time of the selection.

18 ORS 10.330 provides in pertinent part:

> "The county clerk shall, within one week after the court's adjournment, make and file in his office a certified list of all the jurors returned to the court, specifying:
>
> "(1) Those who were discharged for want of qualification, or by reason of exemption.
>
> "(2) Those who did not appear, or were discharged for any reason."

We have reviewed the certified list in the record and find plausible reasons for the excuse of the various jurors.

19 As to the development of the grand jury as an institution here and in England, see United States v. Johnson, 319 US 503, 63 S Ct 1233, 87 L Ed 1546 (1943);

McGrain v. Daugherty, 273 US 135, 157, 47 S Ct 319, 71 L Ed 580 (1927); Blair v. United States, 250 US 273, 282, 39 S Ct 468, 63 L Ed 979 (1919); Hale v. Henkel, 201 US 43, 59, 26 S Ct 370, 50 L Ed 652 (1906); 4 Blackstone Commentaries 301, et. seq.; and further see State v. Tucker, 36 Or 291, 61 P 894 (1900), for Justice Wolverton's thoughtful discussion of the history of the grand jury.

20 ORS 132.010 uses the language "drawn by lot from the jurors in attendance upon the court at the particular term." (Emphasis added.)

21 ORS 10.220(1) provides in relevant part:

> "For the circuit court, 40 names shall be drawn, from which number the grand jurors and trial jurors for the term are selected as provided by law * * *."

22 There are at least 38 statutes in Oregon which use the term "in attendance," ranging from ORS 21.460, "actually in attendance," to ORS 52.520, "then in attendance upon the court." Each must be viewed from a factual perspective.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Respondent on review,	)	SC 29266
	)	
v.	)	
	)	Motion to Recall &
GARY D. GORTMAKER,	)	Reissue Decision &
	)	Judgment
Petitioner on review.	)	

The State of Oregon, respondent, moves for an order recalling the decision and judgment issued in the above-entitled case on or about October 4, 1983, and reissuing the same on October 11, 1983. This motion is made on the ground that the decision and judgment was prematurely issued, in that the Court denied Gortmaker's petition for rehearing in this case on September 20, 1983; and under ORS 19.190, 138.265, and ORAP 11.03(4), the judgment is stayed, by operation of law, until 21 days thereafter, i.e., until October 11, 1983. Petitioner's counsel, Paul De Muniz, was contacted and authorized respondent to state that he

has no objection to this motion.

Respectfully submitted,

DAVE FROHNMAYER (71001)
Attorney General
WILLIAM F. GARY (77032)
Deputy Attorney General

JAMES E. MOUNTAIN JR. (75267)
Solicitor General
THOMAS H. DENNEY (66034)
Assistant Attorney General
Attorneys for Respondent

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Respondent on review,	)	SC 29266
	)	
v.	)	
	)	ORDER
GARY D. GORTMAKER,	)	
	)	
Petitioner on review.	)	

THIS MATTER is before the Court on the Respondent on Review's motion to recall and reissue the final order on Petitioner on Review's motion for rehearing. The Court being advised in the premises, therefore

IT IS ORDERED that the final order issued herein on or about October 4, 1983, is recalled and the same shall issue on or after October 11, 1983.

DATED this 6th day of October, 1983.

/s/Edwin J. Peterson
Chief Justice

APPENDIX D

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

No. 119905, 119906, 119907 & 119908

STATE OF OREGON,	)
	)
Plaintiff,	)
	)
v.	)
	)
GARY D. GORTMAKER,	)
	)
Defendant.	)

MOTION TO QUASH, DISMISS OR SET ASIDE THE INDICTMENT

Comes now the defendant, by and through his attorney, Paul J. De Muniz, and moves the Court for an order quashing, dismissing or setting aside the indictment on the following grounds:

(1) The Grand Jury was not properly selected as follows:

(a) Jurors initially selected for Grand Jury service were not drawn by lot from those in attendance upon the court. ORS 132.010. Article VII, § 5 of the Oregon Constitution.

(b) Some of the grand jurors so selected were excused by someone other than the court in violation of ORS 10.050.

(c) Two grand jurors were excused by the court in violation of the requirements for excusal found in ORS 10.050.

Respectfully submitted,

GARRETT, SEIDEMAN, HEMANN, ROBERTSON & De MUNIZ, P.C.

By: Paul J. De Muniz
Of Attorneys for Defendant

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

No. 119905, 119906, 119907 & 119908

STATE OF OREGON,	)
	)
Plaintiff,	)
	)
v.	)
	)
GARY D. GORTMAKER,	)
	)
Defendant.	)

MOTION TO QUASH INDICTMENTS OR IN THE ALTERNATIVE TO DISMISS INDICTMENTS

Comes now the defendant, by and through his attorneys, Williams & Spooner, and moves the court for an order quashing or in the alternative dismissing the indictment in the above-entitled cases, on the following grounds:

(1) The proceedings before the Grand Jury were conducted by Michael D. Schrunk, who was not and is not District Attorney for Marion County, the Attorney General for the State of Oregon, or a lawfully appointed Assistant Attorney General or special prosecutor. ORS 132.090, ORS 180.020, ORS

180.080, ORS 180.130, ORS 180.140, Art. I, § 10 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

(a) Michael D. Schrunk, who was not and is not District Attorney for Marion County, the Attorney General for the State of Oregon, or a lawfully apointed Assistant Attorney General or special prosecutor, was present during the sittings of the Grand Jury. ORS 132.090.

(b) Michael D. Schrunk, who was not and is not District Attorney for Marion County, the Attorney General for the State of Oregon, or a lawfully appointed Assistant Attorney General or special prosecutor, advised witnesses before the Grand Jury, and prepared and presented indictments in the above-entitled cases to the Grand Jurors. ORS 132.330. ORS 132.340.

(2) James Redden and Michael D. Schrunk, in order to obtain defendant's cooperation in the investigation promised defendant the following

procedures would be utilized:

(a) The prosecutor would develop the facts for both sides of the case.

(b) Prepare a written report, disclose said report to defendant, and allow defendant to respond to the report before the report was presented to the Governor.

(c) Provide defendant with specific allegations of wrong doing by defendant.

In order to obtain defendant's cooperation and testimony before the Grand Jury, Michael D. Schrunk promised defendant as follows:

(d) Provide defendant with a list of witnesses examined by the Grand Jury in advance of defendant's testimony before the Grand Jury.

(e) Report and preserve all Grand Jury Proceedings.

Michael D. Schrunk and James Redden failed to perform each of the above-mentioned promises, and used certain of defendant's records turned over by

defendant in reliance on Michael D. Schrunk's promises, as evidence before the Grand Jury. The breach of Micahel D. Schrunk and James Redden's agreement denied defendant due process of law in violation of Art. I, § 10 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Santabello v. New York, 404 US 257, 92 S Ct 495, 30 Led 2d 427 (1971), Stewart v. Cupp, 12 Or App 167, 506 P2d 503 (1973).

(3) Defendant was denied due process of law when the Grand Jury's selection process resulted in systematic exclusion of any person who knew, were acquainted with or in any way connected with defendant. Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Art. I, § 10 of the Oregon Constitution, Art. VII, § 5(2) of the Oregon Constitution, ORS 10.030, ORS 110.050, ORS 132.010, ORS 132.020, and ORS 132.030.

(4) Defendant was denied due process of law in the Grand Jury selection process in that the Grand

Jurors selected in May were from the March-April term of court and not from the May-June term of court. Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Art. VII, § 5(2) of the Oregon Constitution, ORS 10.210.

(5) The Attorney General for the State of Oregon, by and through its agents, undertook an investigation of defendant, before being directed to do so by the Governor of the State of Oregon. Evidence obtained prior to the date of authorized investigation was used in the authorized investigation and considered by the Grand Jury. Art. I, § 10 of the Oregon Constitution, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, State ex rel Thornton v. Williams, et. al., 215 Or 639, 336 P2d 68 (1959).

(6) Michael D. Schrunk was not a lawfully appointed special prosecutor, but acted as special Assistant Attorney General and utilized the staff of the Attorney General's Office in investigating

defendant. Utilization of the Attorney General's staff, denied defendant, a State official, due process of law and the right to effective assistance of counsel. Art. I, §§ 10 and 11 of the Oregon Constitution, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(7) Michael D. Schrunk did not perform the duties of an independent prosecutor, but allowed the Governor, his assistants, and the Attorney General's Office to decide whether to convene the Grand Jury to consider charges against defendant and thereby denied defendant due process of law. Art. I, §§ 10 and 11 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

This motion is based upon the files and records of the above-entitled case, the affidavits of defendant, Ralph C. Spooner, Carlton Loennig, attached hereto and by this reference made a part hereof, and letters of James Redden, Victor Atiyeh and James Brown, collectively marked Exhibit A, 1-3, attached hereto

and by this reference made a part hereof. The affidavit of Bruce W. Williams will be filed forthwith.

Respectfully submitted,

WILLIAMS & SPOONER

By: _____
RALPH SPOONER
Of Attorneys for Defendant

APPENDIX E

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

No. 119905, 119906, 119907 & 119908

STATE OF OREGON,)
)
Plaintiff,)
)
v.)
)
GARY D. GORTMAKER,)
)
Defendant.)

OMNIBUS HEARING ORDER

On July 10, 1980, this matter came before the court for an omnibus hearing (ORS 135.037) with the Honorable Roland K. Rodman presiding, the plaintiff, State of Oregon, appearing by and through Michael D. Schrunk, Special Assistant Attorney General, Robert C. Cannon, Assistant Attorney General, and James M. Mountain, Jr., Assistant Attorney General, and the defendant, Gary D. Gortmaker, appearing in person and with his attorneys, Bruce W. Williams and Paul J. De Muniz.

The respective parties having submitted evidence, oral argument and memorandum to the court; the court hereby makes the following findings of fact and conclusions of law in the following particulars:

I.

On the state's motion to quash subpoenas served in the above-entitled case by defendant upon Victor Atiyeh, Governor of the State of Oregon, Lee Johnson, Executive Assistant to the Governor, and Denny Miles, Press Aide to the Governor, the court makes the following

FINDINGS OF FACT

The parties stipulated that the attendance of Victor Atiyeh, Governor of the State of Oregon, and Lee Johnson, Executive Assistant to the Governor, were not necessary to the hearing on defendant's motion to quash or, in the alternative, to dismiss the indictments and the parties having stipulated that Denny Miles would be made available to testify if the

defendant so requested.

CONCLUSIONS OF LAW

(1) The State of Oregon's motion to quash the subpoenas served by the defendant in the above-entitled case upon Victor Atiyeh, Governor, and Lee Johnson, Executive Assistant to the Governor, is granted, and

(2) The State's motion to quash the subpoena issued to Denny Miles, Press Aide to the Governor, is denied, based upon the stipulation of the parties.

II.

On defendant's motion to quash the indictments or, in the alternative, to dismiss the indictments in Marion County case nos. 119905, 119906, 119907 and 119908 (said motion containing seven subsections) the court makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The proceedings before the Marion County Grand Jury were conducted by Michael D. Schrunk, a lawfully appointed Special Assistant

Attorney General. Defendant's motion to quash the indictments or, in the alternative, to dismiss the indictments on this ground is denied.

(2) The court finds that former Attorney General James A. Redden and Michael D. Schrunk did not, either individually or jointly, make any promises to the defendant that certain procedures would be utilized during the investigation of the defendant. Mr. Bruce Williams and Mr. Ralph Spooner formed an expectation that they would be able to see a written report to the Governor in advance of any further proceedings against defendant Gortmaker. The court specifically finds that the expectation of Mr. Williams and Mr. Spooner was not the result of any express or implied representation nor the result of any contract or agreement made by either Attorney General James A. Redden or Michael D. Schrunk, Special Assistant Attorney General.

Defendant's motion to quash or, in the alternative, to dismiss the indictments on this ground

is denied.

(3) The Grand Jury selection process was not based upon any systematic exclusion of any person who knew, was acquainted with, or in any way connected with the defendant. The defendant's motion to quash or, in the alternative, to dismiss the indictments on this ground is denied.

(4) Defendant was not denied due process of law in the Grand Jury selection process and the grand jurors were selected from a duly empaneled jury array on order of the presiding circuit court judge of the Marion County Circuit Court. Defendant's motion to quash or, in the alternative, to dismiss the indictments on this ground is denied.

(5) The Attorney General of the State of Oregon is authorized under the Organized Crime Act to initiate investigations of corruption of public officers or employes (ORS 180.600). The Attorney General of this state did not, however, undertake an investigation of the defendant before being directed to

do so by the Governor of the State of Oregon. The investigation was initiated only after the Attorney General was so directed by the Governor. Defendant's motions to quash or, in the alternative, to dismiss the indictments on this ground is denied.

(6) Michael D. Schrunk was duly and lawfully appointed as a Special Assistant Attorney General and properly utilized the staff of the Attorney General's office in investigating the defendant. The Attorney General of the State of Oregon under either the directive of the Governor of the State of Oregon or under the Organized Crime Act (ORS 180.600) has the right to use the staff and support facilities of the Attorney General's office to further the investigation of the defendant or any other public officer to determine whether the public officer has violated any law of the State of Oregon. Defendant's motion to quash or, in the alternative, to dismiss the indictments on this ground is denied.

(7) Michael D. Schrunk was duly and lawfully appointed a Special Assistant Attorney General and recommended to the Attorney General of the State of Oregon, James M. Brown, and the Governor of the State of Oregon that a Grand Jury be convened to consider the charges against defendant. Defendant's motion to quash or, in the alternative, to dismiss the indictments on this ground is denied.

III.

Defendant's motion to suppress each of the indictments, Marion County Case Numbers 119905, 119906, 119907 and 119908, is based upon the same allegations set forth under defendant's motion to quash the indictments or, in the alternative, to dismiss the indictments under II-(2), supra. The court adheres to its former ruling. Defendant's motion to suppress is denied.

IV.

Defendant's motion to quash or, in the alternative, dismiss or set aside the indictments in

Marion County Case Numbers 119905, 119906, 119907 and 119908 on the grounds that the Grand Jury was not properly selected is denied. The Grand Jury was properly selected pursuant to statute and Marion County rules.

V.

Defendant's motion to quash or, in the alternative, dismiss the indictments in Marion County Case Nos. 119905, 119906, 119907 and 119908, on the grounds of highly prejudicial publicity is denied.

The court, after hearing testimony and argument, finds the pretrial publicity did not impair the selection or the deliberations of the Marion County Grand Jury. Defendant did not move for a change of venue. The pretrial publicity was not such as to deny defendant a fair trial based upon community bias or prejudice against the defendant.

VI.

Marion County Case No. 119905 — Demurrer — on the ground the indictment charges more than one

crime not within the same act or transaction is overruled.

VII.

Marion County Case No. 119906 — Demurrer — on the grounds that Counts IA, IB, and II of the indictment are not definite and certain in that they fail to specify the personal or professional services allegedly received by the defendant and that Count IA fails to state an offense pursuant to ORS 164.055.

Defendant's demurrer to Count IA of the indictment is sustained on ground 2 of the demurrer.

The demurrer in all other respects is overruled.

VIII.

Marion County Case No. 119906 — Defendant's motion to quash or, in the alternative, to dismiss the indictment on the ground, that, as a matter of law, defendant receive no commercial benefit from the services allegedly obtained is denied.

IX.

Marion County Case No. 119907 — Demurrer to

Count II of the indictment on the grounds that it fails to state an offense by not alleging the property was entrusted to the defendant.

Defendant's demurrer to Count II of the indictment is sustained.

X.

Marion County Case No. 119907 — Defendant's motion to quash or, in the alternative, to dismiss the indictment for the reasons, (a) the item alleged to have been unlawfully taken under Count I of the indictment was not a firearm, (b) the item alleged to have been unlawfully taken in Count I of the indictment was not and is not the property of Marion County, (c) the item allegedly entrusted and misappropriated in Count II of the indictment was not the property of Marion County, and (d) that no owner suffered a detriment from its disposal of said property. The motion to quash or, in the alternative, to dismiss the indictment is denied.

XI.

Marion County Case No. 119908 — Demurrer — to the indictment on the grounds that Count I of the indictment is not within the statute of limitations and Count II of the indictment fails to state a crime in that it fails to allege the property was entrusted to the defendant.

The demurrer to indictment in Marion County Case No. 119908 is sustained.

Marion County Case No. 119908 — On defendant's motion to quash or, in the alternative, to dismiss the indictment on the grounds the firearm alleged unlawfully taken in Count I of the indictment is not a firearm and the firearm alleged misappropriated was not the property of Marion County, is denied.

DATED this 24th day of October, 1980.

/s/ Roland K. Rodman
CIRCUIT JUDGE

No 83-1125

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY D. GORTMAKER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Is a criminal defendant denied due process of law when the special grand jury which indicts him is selected, in substantial compliance with state law, from among the members of a jury array who have remained in attendance upon the court through a prolonged term of jury duty, and when the selection process did not discriminate against any constitutionally recognized class of people, or result in the empaneling of any grand jurors with actual bias or prejudice in the matter under investigation?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts petitioner's designation of the opinions below, but adds that the opinion of the Oregon Supreme Court is reported unofficially at 668 P.2d 354.

JURISDICTION

Respondent accepts petitioner's statement of the dates alleged to be material to the petition in this case as an accurate statement of the dates in question. Respondent denies that the petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the constitutional provisions alleged to be involved in this case as an accurate statement of those provisions. Respondent denies that those provisions were invoked or relied upon, in or by the Oregon appellate courts.

STATEMENT OF THE CASE

Respondent accepts petitioner's "Summary of Facts" (Petition at 4-7).

Respondent rejects petitioner's statement of the "Procedural History" of this case (Petition at 7-10), and submits the following instead.

In the state trial court, Gortmaker cited the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in his motion to quash or dismiss the indictments against him, on the basis of irregularities in the grand jury selection process. His precise objections were that the selection process excluded people who knew him, and that the grand jurors were selected from the jury array summoned for the wrong term of the court. (*See* Petition at 68-69).

Gortmaker did not pursue these specific claims on appeal. Rather, as the Oregon Supreme Court noted (Petition at 20, 295 Or. at 507, 668 P.2d at 355), he complained that the grand jury selection process violated Oregon law, because (1) grand jurors had been selected, allegedly improperly, from a petit jury panel, (2) the trial court administrator had abused her authority in excusing prospective grand jurors, and (3) some grand jurors had not been "selected by lot from among all the jurors in attendance at the court," as required by the Oregon Constitution. Gortmaker cited no provisions of the federal Constitution, and made no argument based on the federal Constitution, in either the Oregon Court of Appeals or the Oregon Supreme Court.

REASONS FOR DENYING THE WRIT

(1) The petition is not timely filed, because Gortmaker erroneously computed the time for filing his petition from the Oregon equivalent of the date of the issuance of the mandate, not from the date of the denial of rehearing by the Oregon Supreme Court.

As Gortmaker indicates (Petition at 2), the Oregon Supreme Court denied his petition for rehearing in this case on September 20, 1983. He filed his petition for certiorari on December 12, 1983, 83 days after his petition for rehearing was denied. Rule 20.1 of this Court's Rules requires that a petition for certiorari to review the judgment in a criminal case of a state court of last resort be filed within 60 days after the entry of such judgment. Gortmaker's petition for certiorari is, therefore, untimely.

Gortmaker contends (Petition at 2) that the Oregon Supreme Court's order denying rehearing was not formally issued until October 11, 1983, and that, therefore, October 11 is the date from which the time for filing his petition should be computed. As is evident from the order reproduced at page 62 of Gortmaker's petition for certiorari, the "final order" which was issued on October 11 is the Oregon Supreme Court's equivalent of a mandate, not its substantive decision on rehearing. The date such an

order issues is not the date from which the time for filing a petition for certiorari runs. Rule 20.4. *See* Stern & Gressman, *Supreme Court Practice* § 6.3 (5th ed. 1978) [hereinafter cited as "Stern & Gressman"].

(2) The petition is not timely filed, because Gortmaker erroneously failed to mail his petition on or before the 60th day after the date from which even he computed the time for filing the petition.

Even if Gortmaker were correct in his belief that the time for filing his petition for certiorari did not begin running until October 11, 1983, his petition still would be untimely. The 60th day after October 11, 1983, was Saturday, December 10, 1983. Gortmaker did not file his petition for certiorari until Monday, December 12, when he mailed his petition to the Court, ostensibly pursuant to Rule 28.2. His petition is, therefore, two days late, even according to his own understanding of the date from which the time for filing his petition should be computed.

Gortmaker seems to have assumed that when the last day for filing a document in this Court falls on a Saturday, the document need not be filed until the following Monday, as is the rule in the Oregon state courts. Unfortunately for him, that assumption is not correct. Rules 1.2, 29.1; Stern & Gressman § 6.1, at 385.

We recognize that even if our understanding of the Court's rules is correct, the mere fact that Gortmaker's petition is untimely filed does not deprive the Court of jurisdiction to consider it. *See Schacht v. United States*, 398 U.S. 58, 63-65 (1970) (construing the predecessor of present Rule 20.1 in a federal criminal case); Stern & Gressman § 6.1, at 389-394. We submit, however, that Gortmaker's petition does not show any compelling reason for overlooking its untimeliness, and that the untimeliness of his petition is, therefore, a valid reason for denying it.

(3) The petition fails to demonstrate, and cannot, in fact, demonstrate, that the federal questions presented in the petition were raised and decided in the Oregon appellate courts.

At page 11 of his petition, Gortmaker complains that the Oregon Supreme Court "failed to consider whether federal constitutional standards were compromised" by the manner in which the grand jury which indicted him was selected. We agree that neither the Oregon Court of Appeals nor the Oregon Supreme Court considered the federal constitutional implications, if any, of the grand jury selection procedures followed in Gortmaker's case.

However, Gortmaker has only himself to blame for the Oregon appellate courts' failure to consider the federal constitutional questions urged in his

petition for certiorari. As our statement of the case indicates, Gortmaker did not *ask* the Oregon appellate courts to consider the federal constitutional implications of his contentions on appeal. Consequently, there is no federal question raised or decided in the judgment he asks this Court to review. Indeed, Gortmaker's very failure to indicate, in his petition for certiorari, how the federal questions he asks this Court to review were raised and passed upon the Oregon Supreme Court is a tacit acknowledgment that he did not, in fact, raise those questions in the Oregon appellate courts.

Gortmaker seems to think (*see* Petition at 8) that raising a federal constitutional question in the state trial court is enough to give this Court jurisdiction to review the subsequent decision of the state court of last resort in the case, whether or not the federal question was presented to that court, or passed upon by it. This, of course, is not the law. *See Hiawassee Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 343-344 (1920); Stern & Gressman § 3.27 at 218. Moreover, as our statement of the case indicates, Gortmaker's constitutional claims in the trial court were not the same as those he now asserts in his petition for certiorari.

(4) The federal questions presented in this petition would not be substantial enough to warrant review, even if they were properly raised.

In the Oregon appellate courts, Gortmaker's appeal presented a colorable question as to whether the procedure followed in selecting the grand jury which indicted him complied with the constitution and statutes of Oregon. Now, however, the Oregon Supreme Court has held that the special grand jury which indicted Gortmaker was selected in substantial compliance with state law; and the state supreme court's decision on that matter is final. As a result, the only federal question which might have remained for this Court to decide, if the question had been preserved below, is whether Gortmaker was denied due process of law by the grand jury selection procedure followed in his case.

As indicated above, any federal question concerning the selection of the grand jury which Gortmaker arguably raised in the state trial court was not pursued on appeal, and therefore is not properly before this Court. However, even if any such question had been preserved, it would not be substantial enough to warrant review. The grand jury which indicted Gortmaker was selected in substantial compliance with state law. The procedures followed are not claimed to have discriminated against any constitutionally recognized class of people, unlike,

for example, the systematic exclusion of blacks which was involved in *Rose v. Mitchell*, 443 U.S. 545 (1979). Nor was there any showing—or, indeed, any claim, beyond sheer innuendo of the kind set forth at pages 13-14 of Gortmaker's petition—that the procedures resulted in the selection of grand jurors who were actually biased or prejudiced in the matter under investigation. *Cf. Beck v. Washington*, 369 U.S. 541 (1962). To the contrary, Gortmaker generally avoided such innuendo below, as the Oregon Supreme Court noted in its opinion in this case. *See* Petition at 24, 295 Or at 510, 668 P.2d at 357. The facts of this case simply do not even suggest the existence of a federal constitutional question substantial enough to warrant this Court's attention.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

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